

[Docket Nos. 429, 435, 456, 462, 464, 465, 466, 467, 476]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

FINANCIAL CASUALTY & SURETY,
INC.,

Plaintiff,

v.

JOHN BONINO and 007 BAIL BONDS,
INC.,

Defendants.

Civil No. 11-4316 (RMB/JS)

MEMORANDUM OPINION

BUMB, United States District Judge:

This matter comes before the Court upon several post-trial motions filed by Plaintiff, Financial Casualty & Surety, Inc., ("FCS") [Docket Nos. 456 & 462],¹ Defendants John Bonino and 007 Bail Bonds, (the "007 Defendants"), [Docket Nos. 429, 435, 464, 465 & 467],² and Defendants Bail Group Management, LLC, James Mascola and Genevieve Steward, (the "BGM Defendants"). Prior to

¹To the extent Plaintiff has also submitted a "Notice of Stipulated Dismissal," [Docket No. 472], this Court need not sign the dismissal as it was effective when signed by both parties. See Fed. R. Civ. P. 41(a)(1)(A)(ii). In addition, the Court previously signed an Order of Dismissal as to the BGM Defendants, and the Court need not sign off on the settlement between the parties, submitted as Docket No. 473 "Agreed Final Judgment."

² Docket Nos. 429 and 467 are duplicative as are Docket Nos. 435 and 464. As such, these motions will be addressed together.

the start of trial, FCS settled with the BGM Defendants. After the completion of trial, the jury found that both John Bonino and 007 Bail Bonds had breached an implied agreement with Plaintiff; Plaintiff was awarded the premium on reported bonds of \$3,307.00, bond forfeiture judgments and consent judgments in the amount of \$65,280.00, and attorney's fees and expenses in the total amount of \$127,000 against Bonino only. [Docket No. 450].

The Court will address the parties' respective post-trial motions in turn.

1. 007 Defendants' Motion to Reinstate Cross-Claim

The 007 Defendants ask this Court to reinstate their cross-claim against the BGM Defendants as asserted in their answer filed on October 31, 2011. [Docket Nos. 429 & 467]. The 007 Defendants contend that the BGM Defendants were aware of the cross-claim, but "chose not to conduct any discovery in order to defend the claim." [Docket No. 429 at 3]. The 007 Defendants further contend that they "intended to preserve the cross-claim by including a mention of same in their portion of the Pretrial Order." Id. at 4. It is undisputed, however, that this cross-claim was never included in the final and operative version of the Joint Final Pretrial Order by the 007 Defendants. [See Docket No. 367].

Even assuming that this Court accepts the 007 Defendants' argument that the Plaintiff's superseding complaint does not impact the cross-claim asserted in their answer, they have provided no citations to the record to support their argument that the BGM Defendants "specifically consented on the record in open court to allowing the [cross-claim] to go forth." [Docket No. 434 at 7]. In addition, this Court cannot accept the 007 Defendants' argument that they "attempted to preserve [the cross-claim] for trial" by requesting inclusion in the pre-trial order.

The 007 Defendants' dilatory conduct with respect to the Joint Final Pretrial Order is well documented. [See Docket No. 475]. For example, the 007 Defendants, on several occasions, failed to comply with the Court's orders regarding pre-trial submissions. [See Docket No. 343, directing the 007 Defendants to show cause why sanctions should not be imposed for failure to comply with the Court's Order regarding the Joint Final Pretrial Order]. After lengthy proceedings, including a hearing on FCS's motion to strike the 007 Defendants' portion of the Final Pretrial Order for lack of participation in the drafting process, the Joint Final Pretrial Order was entered on February 10, 2014 and included no mention of the cross-claim despite ample opportunity for the 007 Defendants to include the same. [See Docket No. 367].

The law is clear that "a final pretrial order 'shall control the subsequent course of the action unless modified by subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.'" Petree v. Victor Fluid Power, Inc., 831 F.2d 1191, 1194 (3d Cir. 1987)(quoting Fed. R. Civ. P. 16(e)). The conduct of the 007 Defendants with respect to the formation of the Final Pretrial Order clearly does not warrant an amendment to prevent manifest injustice. Moreover, while the trial is now complete and any proceedings as to the cross-claim would necessarily be bifurcated, the Court finds that the subject of the cross-claim involves issues that would require discovery. The bond at issue involves an agreement with the Roche Insurance Company and a third party escrow agent, parties previously unknown to this Court, and arises pursuant to an agreement entirely unrelated to FCS. As such, this Court cannot find that manifest injustice requires that the cross-claim be permitted, and the Court will deny the 007 Defendants' motions.

2. 007 Defendants' Motion for Setoff

The 007 Defendants have moved for a setoff against the \$168,587 verdict, [Docket Nos. 435 & 464], arguing that they are entitled to a setoff because Plaintiff has entered into settlement agreements with other Defendants, who "shared

liability for any damages owed" [Docket No. 464 at 2]. As Plaintiff correctly points out, however, the 007 Defendants have provided this Court with no relevant factual or legal bases for this assertion - i.e., there is no evidence that there is an overlap between the damages awarded to FCS and the settlement with BGM, or any other Defendant. Without any evidence that the judgment against the 007 Defendants actually would result in a double recovery for the same liability, this Court must deny the motion for setoff.³ Cf. Juzwin v. Amtorg Trading Corp., 705 F.Supp. 1053, 1063 (D.N.J. 1989), rev'd on other grounds, 900 F.2d 686 (3d Cir. 1990) ("A defendant in a civil action has a right to be protected against double recoveries . . . because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process.").

3. 007 Defendants' Motion Notwithstanding the Verdict⁴

The 007 Defendants have renewed their motion, previously denied by this Court [Docket No. 439], to dismiss the Plaintiff's complaint based upon the statute of frauds. [Docket

³ This denial is without prejudice. The 007 Defendants shall have 60 days from the date of this Opinion to submit proper support for this motion, if any.

⁴ Presumably, the 007 Defendants are moving pursuant to Federal Rule of Civil Procedure 50 for judgment as a matter of law.

No. 466]. The 007 Defendants contend that the agreement at issue is a surety agreement and, thus, must be in writing. The 007 Defendants, however, have set forth no arguments or law that persuade this Court that it should deviate from the reasoning set forth in its prior Opinion on this very issue. [See Docket No. 439]. Again, this Court has found that the agreement at issue is one for indemnification and, therefore, can be implied. [Docket No. 439 at 5]. In addition, to the extent this Court found, in the alternative, that the 007 Defendants have waived the statute of frauds defense, they present no arguments to refute that finding in their renewed motion. The motion is denied for the reasons previously set forth in this Court's prior Opinion.

4. 007 Defendants' Motion for a New Trial

The 007 Defendants have moved for a new trial pursuant to Federal Rule of Civil Procedure 59 [Docket No. 465]. Rule 59 states that a court may "grant a new trial on all or some of the issues . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court" Fed. R. Civ. P. 59(a). Although the language of Rule 59 does not cite specific grounds for a new trial, there are many reasons why a new trial may be warranted. The most commonly raised reasons are: there was prejudicial error of law, that the

verdict is against the weight of the evidence, the verdict is too large or too small, there is newly discovered evidence, conduct of counsel or of the court has tainted the verdict, or there has been misconduct affecting the jury. 11 C. Wright, A. Miller & R. Kane, Federal Practice and Procedure § 2805, at 55 (2005); see also Lightning Lube, Inc. v. Witco Corp., 802 F. Supp. 1180, 1186 (D.N.J. 1992).

According to the 007 Defendants' brief, a new trial is warranted because "[a]t the conclusion of the trial, the jury entered a verdict solely against Defendant, John Bonino. However, the record is devoid of any evidence that John Bonino acted in an individual capacity with the Plaintiff." [Docket No. 465 at 1]. As an initial matter, the Court notes that the jury did find that 007 Bail Bonds breached an implied agreement with Plaintiff, but did not award any damages with respect to 007. In addition, the 007 Defendants refer to trial testimony in broad strokes, neither citing nor providing the Court with any of the relevant testimony that would be needed to make an informed decision on their motion. Certainly, this Court cannot recreate trial testimony from memory. If the 007 Defendants wish to pursue arguments regarding the "great weight of the evidence," they must provide the Court with that evidence. Because no record evidence has been provided, the 007 Defendants' motion for a new trial will be denied without

prejudice. Evidence in support of a renewed motion must be filed within 60 days.

5. BGM Defendants' Motion to Dismiss Remaining Cross-Claims & Plaintiff's Motion to Dismiss Counterclaim

The BGM Defendants ask this Court to dismiss any remaining cross-claims asserted against them by co-defendants Jeanne Rondeau ("Rondeau") and Anthony Pizzichillo ("Pizzichillo"). [Docket No. 476]. Relatedly, the Plaintiff asks this Court to dismiss Pizzichillo's counterclaim for failure to prosecute as authorized by Federal Rule of Civil Procedure 14(b). [Docket No. 456].

In both Rondeau's and Pizzichillo's respective answers to Plaintiff's complaint they included a cross-claim against the BGM Defendants. [Docket No. 77 & 78]. Pizzichillo's answer also contained a counterclaim against the Plaintiff. [Docket No. 78]. On July 19, 2013, this Court entered summary judgment in favor of Rondeau and she was dismissed from this lawsuit. [Docket No. 320]. Summary judgment was entered against Pizzichillo in October 2012 and a final judgment was entered on May 12, 2014. [Docket No. 442]. As of this juncture, neither Rondeau nor Pizzichillo has prosecuted their claims. In addition, neither Defendant participated in the drafting of the Joint Final Pretrial Order and those claims were absent from that Order.

Under Rule 41(b), a court may dismiss a counterclaim or a cross-claim for failure to prosecute.⁵ When considering such a dismissal, the Court must consider the six factors enumerated in Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863 (3d Cir. 1984). Those factors are:

- (1) the extent of the party's personal responsibility;
- (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery;
- (3) a history of dilatoriness;
- (4) whether the conduct of the party or the attorney was willful or in bad faith;
- (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and
- (6) the meritoriousness of the claim or defense.

Here, both Rondeau and Pizzichillo bear personal responsibility for the failure to prosecute as neither party has taken steps to move forward with the claims at issue. Additionally, as neither Rondeau nor Pizzichillo participated in formulating the Joint Final Pretrial Order, this Court finds that both BGM and Plaintiff would be prejudiced if these claims are not dismissed as trial has been completed in this matter. In addition, the history of dilatoriness is clearly satisfied

⁵ Fed. R. Civ. P. 41(b) states: If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits.

given Rondeau and Pizzichillo's failure to participate in the litigation. While there is no evidence of bad faith here, the Court finds that, at this juncture, there is no sanction other than dismissal that would be appropriate under the circumstances. Finally, with respect to the merits of the claims, both Plaintiff and the BGM Defendants have argued in their papers that the claims lack merit, but, with no opposition papers, this Court is not in a position to make an accurate assessment. See Ramada Worldwide, Inc. v. Veer Enters., LLC, 2013 U.S. Dist. LEXIS 46099, 2013 WL 1314451, at *5 (D.N.J. Mar. 28, 2013) ("The Court declines to address the sixth Poulis factor, as it is impossible to evaluate the merits of [defendant's] defenses given his lack of participation in this action.").

Even without the final factor, this Court finds that at least four of the six factors favor dismissal and this Court will dismiss the cross-claims asserted against BGM by both Rondeau and Pizzichillo and the counterclaim asserted against Plaintiff by Pizzichillo. See Briscoe v. Klaus, 538 F.3d 252, 263 (3d Cir. 2008) ("While 'no single Poulis factor is dispositive,' . . . we have also made it clear that 'not all of the Poulis factors need be satisfied in order to dismiss a complaint.'" (internal citations and quotations omitted)). Both motions are, thus, granted.

6. Plaintiff's Motion for Judgment as a Matter of Law

Plaintiff has filed a motion for entry of judgment against Defendant, John Bonino, and a motion for judgment notwithstanding the verdict and for judgment as a matter of law against 007 Bail Bonds. [Docket No. 462]. To the extent the Plaintiff asks this Court to enter the judgment against Bonino, that request is moot as the judgment was previously entered. [See Docket No. 452].

Plaintiff also asks that this Court to enter judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 against 007 Bail Bonds. Plaintiff avers that the jury's determination that 007 Bail Bonds breached its implied agreement with Plaintiff but its failure to award damages as a result is inconsistent. Plaintiff argues that "the evidence at trial conclusively established that the damages sustained by FCS as a result of the breach of contract by Bonino were identical to those FCS sustained as a result of the breach by 007 Bail Bonds." [Docket No. 462 at 2].

At this juncture, Plaintiff's motion suffers from a lack of specific record cites or case law supporting its conclusions. In addition, this motion raises a question that has not been properly briefed by either Plaintiff or the 007 Defendants: i.e., can an award for attorney's fees premised upon an implied contract remain in this case as a matter of law and, if so, does

the evidence support such an award?

In light of the above, this Court will deny Plaintiff's motion without prejudice. The Plaintiff shall have 60 days from the date of this Opinion to submit a supplemental brief citing the appropriate portions of the trial record and providing case law in support of their point. In addition, both Plaintiff and the 007 Defendants shall have 60 days from the date of this Opinion to provide this Court with supplemental briefing regarding whether an award for attorney's fees can stand as a matter of law where the liability for breach is based only on an implied contract.

s/Renée Marie Bumb
RENÉE MARIE BUMB
United States District Judge

Dated: November 18, 2014